No. 14,106

In The

United States Court of Appeals

FOR THE NINTH CIRCUIT

[illegible]

Appellant

vs.

[illegible]

Appellee

On Appeal From the Judgment of the United States District Court for the Southern District of California

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BRIEF FOR THE APPELLANT.

[illegible]

FILED

[illegible]

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No. 16,106

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HERBERT D. HOVER, Doing Business as Ciro's,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

Opinion Below.

The opinion of the District Court [R. 44-63] is reported at 158 F. Supp. 179.

Jurisdiction.

This appeal involves a deficiency in cabaret taxes assessed[1] against the taxpayer by the District Director of Internal Revenue on or about November 14, 1955, for the period June 1, 1951, to March 31, 1955, in the amount

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[1]The complaint alleges [R. 12] that part of this assessment was barred by the statute of limitations but it was admitted at the trial that a waiver of such statute had been filed. [R. 327, 346.] Thus all of the assessment was timely.

of $67,660.62. [R. 112.] On or about August 2, 1956, the taxpayer paid $300 of such assessment and filed a timely claim for refund of such amount on that date. [R. 15-16.] Subsequently on September 20, 1956, an amended claim for refund of the same amount was also filed. [R. 19-20.] This claim was rejected by the District Director by a letter dated December 5, 1956, and sent by registered mail. [R. 21.] Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and Section 6532 of the Internal Revenue Code of 1954 and on December 21, 1956, a suit for refund was instituted by a complaint filed in the District Court. [R. 3-21.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. On September 4, 1957, the United States, appellant herein, filed an amended answer and counterclaim for collection of the balance of the cabaret taxes above referred to and interest in the sum of $81,819.07 together with interest from July 1, 1957, until paid. [R. 22-30.] A reply to the counterclaim was filed by the taxpayer on September 10, 1957. [R. 30-31.] On February 28, 1958, the District Court entered judgment (1) decreeing that the taxpayer take nothing by his complaint for refund of $300, and (2) that United States have judgment against the taxpayer on its counterclaim in the amount of $7,463.86 together with interest thereon until paid. [R. 125.] The motion for new trial and the motion to amend and make additional findings of fact and conclusions of law which were filed on behalf of the United States were denied by an order filed March 31, 1958. [R. 127-128.] Notice of appeal from the above judgment and order was filed on May 14, 1958. [R. 128-129.] This Court has jurisdiction under 28 U. S. C., Section 1291.

Questions Presented.

1. Whether the District Court erred in holding that the statute imposing the cabaret tax was not intended to apply to all amounts paid for the designated items during an evening at a cabaret by patrons who have attended private parties but who are entitled to be present and are present at the cabaret's public performance, and also in limiting the tax to amounts paid by such patrons during the cabaret's public performance.

2. The District Court held that taxability of preperformance payments by patrons of private parties should depend upon the motive of the patrons in coming to the cabaret. Assuming *arguendo* that this statutory interpretation is correct, the question is whether the District Court erred in concluding that the floor show was not a cogent reason for the selection of Ciro's cabaret by such patrons but was merely incidental to other reasons.

3. Whether the District Court erred in not entering judgment for the full amount of the taxes assessed (less the $300 paid by the taxpayer) inasmuch as the taxpayer failed to overcome the presumption of correctness attaching to the assessment by the production of proper records or by other proof.

4. Whether the District Court erred in finding that under the evidence here the entertainment for the patrons of the "Closed House" parties was furnished by such patrons rather than by Ciro's, and for that reason the cabaret tax cannot be imposed on payments made by such patrons.

Statutes and Other Authorities Involved.

The pertinent provisions of the statute and other authorities appear in the Appendix, *infra*.

Statement.

The facts as found by the District Court are as follows [R. 112-122]:

On November 14, 1955, cabaret taxes in the amount of $67,660.62 and interest in the amount of $7,858.51 were assessed against Herbert D. Hover, d/b/a Ciro's, for the period June 1, 1951, through March 31, 1955. Upon notice and demand for payment being made, Mr. Hover (referred to herein as taxpayer) paid $300 leaving an outstanding balance of $75,219.13. [R. 112-113.][2]

The above assessment represented additional taxes assessed with respect to three phases of taxpayer's operation for the period involved, namely, the Ciroette Room, the Pavillion Room and the "Closed House" parties. The amount assessed was determined by Revenue Agents who examined the taxpayer's books and records and who applied the cabaret tax to a certain percentage of the receipts of each room on a basis more fully explained below. The taxpayer, not having considered the receipts here in issue as taxable, did not segregate any portion of such receipts as cabaret taxes in his books and records. Also taxpayer kept no records showing what, if any, proportion of the persons who attended the parties in the Pavillion Room stayed for the floor show or for dancing. [R. 113-114.]

Ciro's is a famous night club located on Sunset Boulevard in Los Angeles. It is subdivided into three rooms in which the services and facilities of the club are offered to the public. These are the main entertainment and

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[2]Taxpayer has conceded that $992 of the taxes assessed was attributable to its "Main Room operations" and was owing because of a clerical error and is not in issue. [R. 113.]

dining room (referred to here as the "Main Room"), the Pavillion Room and the Ciroette Room. Ciro's has widely advertised its entertainment and in its advertisement has also offered the facilities of the Pavillion and Ciroette Rooms for banquet groups. One of the several inducements for such gatherings in those rooms was the opportunity to view the floor show. [R. 114, 116.]

Pavillion Room.

The Pavillion Room is located adjacent to the lounge and is separated therefrom by a movable wall and thick, soundproof curtain. The lounge is a slightly elevated portion of the Main Room and the Pavillion Room is further raised, thereby creating a six-step elevation differential between the Pavillion Room and the Main Room. Because of this added height the patrons sitting in the Pavillion Room can view the entertainment in the Main Room when the separation wall and curtain are withdrawn by looking through the adjacent lounge. Since the stage is located at the other end of the Main Room, obtaining a good perspective of the floor show from all portions of the Pavillion Room is difficult in view of the distance involved, and those in the rear of the Pavillion Room must move their seats into the fore part of that room in order to view the show. [R. 114, 117.]

Though ingress and egress to both rooms is possible by way of the lounge, the Pavillion Room also has its own separate entrance. Rest Rooms are shared in common with the Main Room, though entrance can be made from the Pavillion Room itself. Each room has its separate dance floor and band stand. Tables and chairs used in the respective rooms seem to be of a different character and their arrangement dissimilar. The building plans further disclose that the two rooms were not con-

structed as one unit but that the Pavillion Room was added long after the Main Room had been in existence. Upon the closing of the partition separating the two rooms there is an atmosphere in the Pavillion Room of complete privacy. [R. 117-118.]

The Government assessed a cabaret tax on 94 per cent of the receipts attributed to 304 private parties conducted in the Pavillion Room. The 6 per cent of the receipts excluded from the tax represents amounts paid for food, refreshment or merchandise by patrons who are presumed to have left prior to seeing the floor show. While there is some variation in the way these 304 parties were conducted, usually private organizations would contact Ciro's to arrange for the exclusive use of this room on a particular night. A contract would be negotiated and a deposit secured. Generally the service of the dinner would commence around 7:00 p.m. and terminate before 10:30 p.m. and was completed before the floor show began. During that time the movable partition separating the Main Room from the Pavillion Room would remain closed and the parties would have complete privacy. Depending on the nature of the organization, speeches, awards, community singing, local entertainment or dancing to music either piped in from the Main Room or furnished by their own hired orchestra might follow the dinner. In any event at approximately 10:30 p.m. the separation was usually removed so as to enable the groups to view the floor show in the Main Room. [R. 114-115, 118.]

The patrons attending the dinner in the Pavillion Room expected to be able to see the entertainment in the Main Room, as it was the understanding, whether committed to writing or not, that the so-called private parties would be afforded this privilege. Upon conclusion of the floor

show, most of the guests at the private parties left the premises. In view of the removal of the partition at or about 10:30 p.m., there was a public performance in regard to the Pavillion Room guests from that time on but the 304 parties in dispute were private up to 10:30 p.m. [R. 115-116.]

The District Court stated that the floor plan and structural layout of the Main Room and the Pavillion Room compels the finding that two separate and distinct rooms were contemplated by Mr. Hover and that it was intended that Ciro's would acquire the private party business by offering the privacy necessary to these organizations in the execution of their customry meetings or gatherings while affording them the opportunity of functioning in a well-known establishment like Ciro's. The District Court also stated that a comparison of the respective operations of both rooms further discloses an intent on the part of the management to treat the rooms other than as a single unit. There are some 25 basic differences in the operations of the two rooms. These include differences in menus, prices, services, working hours and duties of the waiters, manner of payment, parking fees, and cover charges. [R. 116-118.]

Any intent by the private organizations of being assimilated into the general over-all cabaret atmosphere of Ciro's was of incidental significance in their decision to conduct their parties in the Pavillion Room. These groups did not consider themselves as part of the public patronage at Ciro's. Their conscious choice to reserve the Pavillion Room indicates that the prime moving consideration in selecting that room was the desire to achieve some sense of privacy for their group activity and business—at least until the entertainment began. [R. 118-119.]

Upon the removal of the partition at show time, the Pavillion Room guests did observe and participate in the public performance in common with the other patrons in the Main Room and no distinction between the two rooms is warranted during that period. The position of the Pavillion Room guests during this period is analogous to the patrons of the lounge during the show or to the late-comers to the Main Room, who because of the crowded conditions existent there, are forced to stand at the bar in the lounge in order to see the floor show. Any payments from drinks or refreshments made by these patrons were, of course, subject to the tax. With respect to the $55,581.98 assessed against the Pavillion Room receipts, the parties have stipulated that $5,200.63 would represent the tax on food, refreshment or merchandise served to patrons or guests subsequent to 10:30 p.m. No admission charge was made to enter the Main Room from either the Ciroette Room or the Pavillion Room. [R. 119-120.]

Ciroette Room.

The Ciroette Room like the Pavillion Room was used primarily to accommodate private gatherings. However, unlike the Pavillion Room, it was located on the second floor of the building and those patrons desiring to see the floor show could do so only by descending a flight of stairs and passing through two doorways to the Main Room. The taxpayer permitted members of private organizations using the Ciroette Room to see the entertainment at 10:30 p.m. Some 5 per cent of the Ciroette patrons did in fact avail themselves of this opportunity. The Government assessed a cabaret tax based on 5 per cent of the receipts taken in by the Ciroette Room. It was stipulated that if any tax is due it is to be computed

on the basis of 5 per cent of these receipts and the only question presented for consideration is whether as a matter of law the cabaret tax applies to this 5 per cent. [R. 120.]

As the nature of the private parties in the Ciroette Room was similar to those conducted in the Pavillion Room, the above findings on this subject were held to be pertinent here and were incorporated by reference. [R. 121.]

Closed House Parties.

Part of the initial deficiency assessment consists of a tax on all amounts paid for admission, refreshment, service or merchandise on twenty evenings when all the facilities of Ciro's were reserved for the members of one particular organization and these are referred to as "Closed House" parties. On such occasions, the show and orchestras usually provided were the same as was regularly staged by Ciro's and Ciro's advised the private organizations as to the amount and distribution of the payments to be made to the performers if the private organizations should hire them. The private organizations themselves contracted for the entertainment and music supplied to the "Closed House" parties. In all cases checks in payment were made payable by the private groups to the performers. Private groups could, if they so desired, rent the Main Room without the Ciro entertainment and could furnish instead their own entertainment and orchestra. When the Ciro entertainers were retained by the private groups they were able to exercise control over the time when the performers would commence and the type of performance. Any service rendered by Ciro's was purely advisory and for the convenience of the private group. [R. 121-122.]

The District Court found that Ciro's did not furnish the entertainment on these twenty evenings in issue. The private organizations remained free to reject the regular entertainment appearing at Ciro's and if they chose to engage such performers, could modify their acts to suit their own purposes. Although on 6 of the 20 nights in question the public was admitted, the public was admitted only after the private groups had concluded their private parties and surrendered the premises. [R. 122.]

From the above findings, the District Court reached the following conclusions of law [R. 122-124]:

I. The statute imposing the cabaret tax is not intended to cover those pre-performance parties by those patrons whose desire to be present at the public performance was incidental to some more cogent reason for attending the carbaret, such as a private gathering of a private group or organization for the conduct of its business.

II. The words "entitled to be present" in the statute do not apply to the Pavillion Room or Ciroette Room parties where the main purpose of the parties engaging such rooms was other than to be present at the entertainment.

III. If the parties had ended before the commencement of the floor show or if the partition had remained closed and the Pavillion Room patrons excluded from entering the Main Room or observing the entertainment therein, the expenditures before 10:30 p.m. would not lie within the scope of the tax, even if the group using the Pavillion Room had arranged for their own entertainment, since under the statute there would be no public performance.

IV. It has been stipulated that the $5,200.63 representing the tax on drinks served after 10:30 p.m. is equivalent to the tax on the amounts paid for food, refreshment and merchandise by or for patrons or guests of the Pavillion Room entitled to be present during such performance for profit and is the correct amount of tax on the Pavillion Room operation. The court concluded that the sum of $5,200.63, is the proper tax on amounts paid by or for patrons in that room for food, refreshment or merchandise after 10:30 p.m.

V. The tax assessment on 5 per cent of the Ciorette Room's receipts is improper.

VI. After the private groups had concluded their parties and surrendered the premises, the club subsequently reverted to a cabaret status and this has no bearing on the nature of the parties from which the public was rigidly excluded.

VII. With respect to the "Closed House" parties, the payments received by Ciro's did not entitle the patrons or guests to be present during public performances for profit.

VIII. The Government is entitled to judgment on its counterclaim for the tax on the amounts paid for refreshment in the Pavillion Room after 10:30 p.m. and for its costs.

The District Court then entered judgment denying the taxpayer's claim for refund of the $300 which he had paid on the additional assessment and allowed the Government $7,463.86 (with interest) on its counterclaim. [R. 125.]

Statement of Points to Be Urged.

1. The District Court erred in failing to award judgment for the Government on its counterclaim in the full amount prayed for, $81,819.07, together with interest according to law.

2. The District Court erred in concluding that the statute imposing the cabaret tax was not intended to cover all the amounts paid for admission, refreshments, service or merchandise by or for those patrons of Ciro's who were entitled to be present during any portion of the public performance and in concluding that the tax was limited to those amounts paid for refreshments, service and merchandise served during the time of the performance.

3. The District Court erred in concluding that the words, "entitled to be present" in the applicable statute did not apply to the Pavillion Room or Ciroette Room parties.

4. The District Court erred in holding with respect to the Pavillion Room operation that the amount of tax applicable to the drinks served therein after 10:30 p.m. (when the floor show began) is a proper measure of the tax due on account of amounts paid by or for patrons in that room who were entitled to be present at the show.

5. The District Court erred in not holding that the taxpayer had failed to keep records required by law as to the amounts paid for food, refreshment or merchandise by or for patrons of the Pavillion Room who were entitled to and did witness the show in the Main Room, and in not holding that the taxpayer had failed to sustain his burden of showing that the assessment was erroneous.

6. The District Court erred in concluding that the tax assessment on five per cent of the Ciroette Room's receipts was improper.

7. The District Court erred in concluding, with respect to the "Closed House" parties, that the payments received by Ciro's did not entitle the patrons or guests to be present during public performances for profit.

8. The evidence was insufficient to justify the District Court in finding (1) that the operation of the parties in the Pavillion Room was not so intimately related to the general operation of the Main Room and that viewing of the show at 10:30 p.m. in the Main Room was not considered such an integral part of the activities of parties in the Pavillion Room, that it can be reasonably inferred that the compelling motive in reserving the Pavillion Room was to see Ciro's entertainment, and (2) that Ciro's did not furnish the entertainment for the twenty Closed House parties involved here.

9. The District Court erred in determining that the United States is entitled to any less than the full amount of tax assessed with respect to the Pavillion Room because the taxpayer failed to keep adequate records as to payments made by patrons who witnessed the public performance and failed to overcome the presumption of the validity of the Government's assessment of the tax.

10. The District Court erred in failing to find and conclude that the desire to be present at the cabaret performance was a major consideration for the groups in question to engage Ciro's facilities whether they were the Pavillion Room, the Ciroette Room, or the entire facilities for the so-called "Closed House" parties.

Summary of Argument.

1. This appeal involves a cabaret tax assessment on amounts paid by or for patrons of the so-called "Closed House" parties at Ciro's and also on those amounts paid by or for patrons at private parties in Ciro's Pavillion and Ciroette Rooms. The latter amounts were paid for items served before Ciro's floor show began. It is conceded that Ciro's is a cabaret, that its floor show and music for dancing constitute a public performance within the meaning of the applicable statutory provision, and that the payments made by persons who are patrons of its Main Room and lounge and who are entitled to be present at its floor show are subject to the cabaret tax.

Specifically the statute imposes this tax on all amounts paid for admission, refreshment, service or merchandise at a cabaret by or for any patron or guest who is entitled to be present during any portion of the public performance given by the cabaret for profit. The language used in such statutory provision is clear and simple and should be interpreted so that it will be given its commonly understood meaning. In applying this provision, it has been the policy of the Government to tax all amounts paid by or for patrons and guests at private parties given in the cabaret providing such patrons are entitled to be present and are present at the cabaret's public entertainment. We submit that this is a fair and proper application of the statute.

However the District Court held that the statute cannot be given its literal meaning, and emphasized particularly that the statutory words "all amounts" and "entitled to be present" cannot be applied to the preperformance payments by or for patrons at private parties in the Pavillion and Ciroette Rooms at Ciro's unless it be shown that

the desire to see the floor show was a compelling reason for such patrons' attendance at Ciro's. We submit that this makes taxability of such payments depend upon a subjective test and that there is no authority in the statute for such a test, and if applied would make administration of this statutory provision very difficult, if not impossible. Moreover, the District Court was not warranted in relying on *La Jolla Casa De Manana v. Riddell,* 106 F. Supp. 132 (S. D. Cal.), affirmed *per curiam,* 206 F. 2d 925 (C. A. 9th), because that case is not only distinguishable on its facts but the Government's interpretation of the statute here is in accord with the decision reached therein.

2. However assuming *arguendo* that the District Court's interpretation of the applicable statutory provision should be followed, we submit that its decision should still be reversed because its conclusion is contrary to the evidence and some of its own findings of fact. The evidence shows that the patrons composing the private parties at Ciro's were very much concerned with the opportunity to see the floor show and that they not only expected to see it when they came to these parties but Ciro's also held out its show and other public entertainment as an inducement for such parties both in its widespread advertisement and in the personal contacts made with the representatives of the groups giving the parties. Such evidence clearly indicates that Ciro's floor show was a cogent reason for the parties.

3. A presumption of correctness applies to the tax assessment here and the taxpayer had the burden of overcoming such presumption by producing evidence. However although the law requires the taxpayer to keep adequate records covering his daily operations and receipts

he admits that no record was kept of the number of patrons at private parties in the Pavillion Room who remained to see the show in the Main Room after the curtain between the two rooms was drawn back. The taxpayer has also failed to produce any other evidence to show that the basis on which the tax was imposed on receipts from patrons of the Pavillion Room was in any way incorrect. Therefore under either interpretation of the statute referred to herein, the District Court should have entered judgment for the United States in the full amount of the taxes and interest asserted.

4. During the period involved twenty "Closed House" parties were held by private organizations at Ciro's. These parties were not only held at the usual hours when Ciro's was customarily open and operating but they had the same shows and orchestras which were being used by Ciro's at the time the parties occurred. Also employees of Ciro's actually made the arrangements for such entertainment. It is the position of the Government that the arrangements made by these private organizations with Ciro's should be regarded merely as a reservation of tables. We also submit that although such groups were required to make separate checks for the entertainment, Ciro's actually furnished the entertainment. Thus the District Court was in error in not imposing the cabaret tax on payments by these groups.

ARGUMENT.

I.

The District Court Erred in Holding That the Statute Imposing the Cabaret Tax Was Not Intended to Cover All Amounts Paid for the Designated Items by or for Patrons Entitled to Be Present During Any Portion of a Cabaret's Public Performance, and in Concluding That the Statute Limited Such Tax to Amounts Paid for Refreshments Served During the Time of the Performance.

A. Introductory.

No question has been or can be raised as to the classification of Ciro's restaurant as a cabaret within the meaning of the applicable statute. It is also admitted that Ciro's has usually presented a floor show in its Main Room about 10:30 p.m. which constituted a public performance under the statute. The taxpayer (as owner of Ciro's) has regularly reported and paid a cabaret tax on the amounts received from patrons in its Main Room and adjoining lounge. During the period here this tax was limited by the taxpayer to 94 per cent of such receipts, it being presumed that 6 per cent was paid by patrons who did not remain for the entertainment. The Government accepted that estimate and in assessing the taxes involved here on receipts from patrons of the Pavillion Room, used the same percentage in computing the tax due on such amounts. [R. 46-47, 344-346.] But the District Court disallowed most of this assessment as it limited the tax on receipts from patrons in the Pavillion Room to amounts actually paid for refreshments served after 10:30 p.m. (which was during the floor

show); and it also refused to approve the tax assessed by the Government on 5 per cent of the receipts from patrons of the Ciroette Room. [R. 59-60, 123-124.] We submit that the District Court's decision as to the tax on receipts from the patrons of these rooms is primarily due to an erroneous interpretation of the law.

B. Applicable Statutory Provisions and Other Authorities.

As the cabaret taxes assessed herein cover the period June 1, 1951, to March 31, 1955, the applicable statutory provisions are found in Section 1700(e) of the Internal Revenue Code of 1939 and Sections 4231 and 4232 of the Internal Revenue Code of 1954, Appendix A, *infra*. It will be seen that the provisions in both Codes are substantially the same, and that the portions we are primarily concerned with here are set forth in identical language and provide that there shall be levied, assessed, collected and paid—

> A tax equivalent to 20 per centum of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. * * *

In interpreting and applying this provision, the District Court refused to read it literally and in taking that position stated [R. 48] that "A literal translation of the above provision would ascribe to Congressional intent a most arbitrary and unreasonable basis on which the tax is imposed." But the court did not give any convincing reasons to support this statement or for its refusal to

apply the statute as written,[3] and we submit that in failing to follow it literally it clearly erred.[4]

When a statute is written in clear and simple language the proper way to determine its meaning is obviously by the language used therein and it is evident that the statutory provision involved here is written in such language. Not only is the sentence structure clear but every word therein is one in common usage and widely understood. Under a long established rule, words in a tax statute must be given their ordinary and commonly accepted meaning. *Deputy v. du Pont,* 308 U. S. 488, 493; *Old Colony R. Co. v. Commissioner,* 284 U. S. 552, 560. Moreover, effect must be given, if possible, to all words and parts of a tax statute so that none will be insignificant or meaningless. *Technicolor Motion Picture Corp. v. Westover,* 202 F. 2d 224, 228 (C. A. 9th). But when these rules of statutory construction are applied here it becomes apparent that the ordinary meaning of the statutory language is necessarily the same as its literal meaning, which the District Court has rejected.

Consequently it is our position that it was the intention of Congress to impose a cabaret tax on all amounts paid for food, refreshment, service or merchandise by or for

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[3]In arguing against the Government's interpretation, the only illustration given at this point in the District Court's opinion [R. 48] is that of afternoon patrons who might stay on for the floor show which usually began about 10:30 p.m. The record does not show that there ever were such patrons and if there were, presumably they would be in the Main Room or lounge where it appears to be conceded that a tax should be imposed on all amounts paid by patrons who remain for the floor show.

[4]We have found nothing in the Congressional reports which would indicate that Congress intended anything but a literal reading of the statute nor did the court below refer to any such reports to support its views as to what the Congressional intent was when the cabaret tax was imposed.

patrons or guests who are entitled to be present during any part of the public performance given at a cabaret for profit. It will be seen from the District Court's opinion that the court rejected the Government's interpretation of the statute largely because it was unwilling to give the words "all amounts" and "entitled to be present" their ordinary and commonly accepted meaning. [R. 53.] We shall discuss this more fully below but we wish to point out here that we know of no valid reason why the court should hesitate to give such meaning to those words.

Of course all of the patrons of the Pavillion and Ciro-ette Rooms who were attending so-called private parties therein were actually entitled to be present at Ciro's floor show and a tax on all of the receipts from them would add considerably to the total amount of tax due but that is certainly not a valid reason for failing to give words of a statute their true meaning. Moreover in applying the above statutory provision, it has been the Government's policy to include only receipts from patrons who not only are entitled to see the show but who have in fact remained to see it. The Government's position is explained in Rev. Rul. 54-487, 1954-2 Cum. Bull. 376 (Appendix A, *infra*) which provides, in part, as follows:

> The cabaret tax applies to all amounts paid for food, refreshment, service, or merchandise by patrons or guests who are present during any part of the entertainment, even though such patrons or guests make payment for the food, refreshment, service, or merchandise prior to the time the entertainment starts. For the tax to apply, it is not necessary that such patrons or guests be able to witness the entertainment, and partake of food or refreshments at the same time.

> It is held that payments for food, refreshment, service, or merchandise made prior to the beginning of the entertainment in a cabaret, roof garden or other similar place are subject to the cabaret tax imposed by section 1700(e) of the Code, where the patrons or guests by or for whom such amounts are paid remain for any portion of the entertainment afforded. However, the tax does not apply to payments made by or for patrons or guests who leave the establishment prior to the beginning of the entertainment, or who enter and leave during an intermission period, or who enter after the entertainment has ceased.

See also Section 101.13 of Treasury Regulations 43 (Appendix A, *infra*).

We submit that the position taken in the above ruling is a fair and proper one. The statute contains no provision requiring that a patron make his payment for any of the designated items or partake of any refreshments during the time that he is viewing the cabaret's show, and such requirement should not be read into statute. The only statutory conditions, so far as the patron is concerned, are that he make payments and that he is *entitled to be present during part of the public performance.* As indicated, the Government through a liberal interpretation of the statute has included only patrons who are entitled to see the show *and have remained to see it.*

C. Errors in the District Court's Interpretation of the Applicable Statute.

As indicated above, the District Court held that the cabaret tax could be applied to amounts paid for refreshments served after 10:30 p.m. (when the floor show began) to patrons who had been in attendance at one of

the private parties in the Pavillion Room.[5] [R. 123-124.] In so ruling, the District Court must have found that such patrons were "entitled to be present" at a public performance and in that particular connection must have given the words "entitled to be present" their ordinary meaning. But it refused to give that meaning to those words when determining whether to tax payments made by the same patrons of the Pavillion Room for items served prior to the show. However the basis for its refusal was not that it thought payments and eating of food should occur at the same time as viewing of the public entertainment. Indeed it indicated [R. 51] that in some cases the preperformance payments should be taxed. The reason for these seemingly inconsistent views is that the District Court was of the opinion that the taxability of preperformance receipts should be determined by the motives of the patrons (comprising the private parties) in coming to the cabaret. We submit that this is an unwarranted interpretation of the law but as the District Court has repeatedly emphasized the importance of motive we wish to call attention to the following statements in its opinion [R. 53, 55, 56]:

> As noted earlier, *"entitled to be present" cannot be construed literally and must be read in the light of the circumstances of each individual case.* Even assuming arguendo that in view of the removal of the partition at or about 10:30 p.m. there was a public

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[5]Presumably patrons of the Ciroette Rooms were also taxed on amounts paid by them for refreshments during the show but as they had to view the show from the Main Room or lounge, any receipts from them were apparently mingled with receipts from the regular patrons in those rooms. But the District Court held that no preperformance receipts from Ciroette Room patrons were taxable although it was stipulated [R. 161] that 5 per cent did see the show in the Main Room.

performance in regard to the Pavillion Room guests it is not determinative of whether such guests were entitled to be present under the meaning which I have ascribed to such words. The fact that the Pavillion Room parties may have been public when viewed in their entirety is immaterial insofar as it pertains to the pre-performance receipts if it be shown that the main purpose of private groups in engaging the Pavillion Room was other than to be present at the entertainment. * * *

It follows that in the instant case a determination of whether the parties when viewed in their entirety are public or private cannot be conclusive of the ultimate issue presented. Rather, the applicability of the tax is to be *tested by the motivation formulation which I have previously described.* * * *

The crucial determination then, as I see it, is whether the operation of these so-called private parties is so intimately related to the general operation of the Main Room, and the viewing by the Pavillion Room guests of the entertainment at 10:30 p.m. such an integral part of their evening's activities, that it can be reasonably inferred *that the compelling motive in reserving the use of the Pavillion Room was for purposes of seeing Ciro's entertainment.* * * * (Italics supplied.)

From these excerpts, it is obvious that the District Court has ignored the true meaning of the statute and has read into the statute something which was neither included nor intended by Congress, namely, a subjective test as to the motives of patrons who stay for a floor show after attending a private party in some room of a cabaret. Certainly it is apparent that any subjective test would be difficult to make and is not a satisfactory one in the exact field of taxation. At any rate, such a

test should not be required in any tax matter without clear Congressional authority and there is none here. Instead in imposing the cabaret tax, Congress specifically indicated that it should be applicable to all amounts paid for the designated items by or for patrons or guests entitled to be present at a public performance for profit in a cabaret. This clear and exact statutory language makes the determination of the motives of any patron or guest immaterial.

D. The Cases Which the District Court Relied on Do Not Support Its Decision.

This District Court cited three cases which involve the cabaret tax. Two of these will be discussed below under Point IV. The third one is *La Jolla Casa De Manana v. Riddell,* 106 F. Supp. 132 (S. D. Cal.), affirmed by this Court *per curiam,* 206 F. 2d 925. As we shall now point out the facts in the *La Jolla* case are distinguishable but the conclusions reached therein support the Government's position here.

The taxpayer in that case was the owner and operator of a hotel which had accommodations for dancing on its terrace and furnished music for such dancing from about 9 p.m. until midnight. Refreshments were sold at a bar adjoining the terrace and could be obtained until 2 a.m. The taxpayer paid the cabaret tax on all amounts collected from the patrons until midnight but the Government also assessed a cabaret tax on amounts spent at the bar during the period from midnight until 2 a.m. if the patrons making the payments had been present during some portion of the music and dancing. It was held that no tax could be applied to such amounts because the establishment had ceased to be a cabaret after midnight. In explaining its position, the District Court pointed out

that the Government had in effect conceded that there was no cabaret after midnight when it conceded that no tax could be imposed on amounts spent by a patron who had not been present at any portion of the performance before midnight.

In the instant case the District Court indicated that it was using the same reasoning as that employed in the *La Jolla* case but we submit that it failed to recognize the essential difference in the two cases. Obviously in the *La Jolla* case, amounts spent from midnight to 2 a.m. could not entitle any patron to be present at the dancing or to hear the music which had ceased at midnight and for that reason it was held that no tax could be imposed on such amounts. But here the amounts spent by patrons for dinner or other refreshments served at private parties in the Pavillion and Ciroette Rooms actually did permit them to be present at the floor show given in Ciro's Main Room. Indeed if they had not spent such amounts they could not have been present unless of course they had been patrons in the Main Room or lounge, in which case their payments would certainly have been taxed. Thus there is in this case that essential relationship between service of refreshment and the enjoyment of the entertainment which the *La Jolla* case refers to and the facts of this case meet the requirement set out therein, namely "that the payment for the refreshment should operate to entitle the patron to view the entertainment, or participate in the dancing, as the case may be." (P. 135.)

II.

The Decision of the District Court Is Based on Erroneous Conclusions and Should Be Reversed Regardless of Whether Its Interpretation of the Statute is Correct.

We do not of course accept the District Court's interpretation of the applicable statutory provisions but even assuming *arguendo* that its interpretation is correct, we submit that its decision should still be reversed because it reaches conclusions contrary to the evidence and its own findings of fact.

As we have pointed out, the District Court stated in its opinion [R. 52-56] that taxability of preperformance receipts from patrons of the Pavillion and Ciroette Rooms should be determined by the motive of such patrons, and this is also indicated in the court's conclusions of law. The first conclusion is, in substance, that the cabaret tax was not intended to cover preperformance parties by those "whose desire to be present at the public performance was incidental to some more cogent reason for attending the cabaret" and its second conclusion is that the statutory words "entitled to be present" do not apply to the Pavillion Room or Ciroette Room parties "where the main purpose of the parties" was other than to be present at the entertainment. [R. 122-123.] As the District Court then decided that the cabaret tax could not be applied to preperformance payments by patrons of these two rooms, we must of course assume that the court's ultimate conclusion is that the desire of such patrons to attend the cabaret performance was *merely incidental* and not a cogent reason for coming to these parties. We do not agree because the evidence and certain findings of fact show otherwise.

Mrs. Dolores Miller, who handled most of the contracts and preliminary arrangements for banquets at Ciro's testified that it was normal procedure to advise groups requesting the Pavillion Room that they could see the floor show by pulling aside the accordion curtain and that it was the practice of most of the groups to see the show. [R. 306-307.] She also stated that she knew they liked the idea of being able to see the show and the opportunity to do so was "one of the selling features" for holding their parties in the Pavillion Room. [R. 310, 311.]

Four persons who had made arrangements for groups to have parties in the Pavillion Room also testified. Vincent Johnson stated that when making arrangements for his group's party, he was told that at floor show time the curtain would be drawn back and that the group could see the show, that this was done and that 100 per cent of his group (numbering 85) stayed to see the show. [R. 248.] The other three witnesses gave similar testimony and explained as to the number who remained to see the show that in each instance it was almost 100 per cent. [R. 252-253, 264, 277.] At the close of this testimony, the parties herein then filed a stipulation stating that it was agreed if representatives of each of the remaining 300 Pavillion Room parties were called as witnesses, each would give answers similar to those given by the four witnesses who had appeared. But this stipulation also pointed out that there were about six groups which had regular business meetings in the Pavillion Room and did not see the show. [R. 278-280.] Three witnesses who arranged for parties in the Ciroette Room testified that they too had been given the opportunity to see the floor show and that a considerable number had done so. [R. 294, 296-297, 302-305.]

Further evidence as to the concern of private parties about seeing Ciro's floor show is found in the Government's Analysis of Joint Exhibit 2-B (attached to the Stipulation). [R. 32-35.] This is an analysis of the comments appearing in the written contracts made by Ciro's with representatives of groups holding parties in the Pavillion Room. It will be seen that most of the comments therein were about the show, that both Ciro's and the representatives of the various groups expected most of the groups to see the show, and that in 257 instances the groups were advised by Ciro's that the price of drinks would be raised from 75 cents at dinner time to 90 cents at show time.

The District Court ignored some of this uncontroverted evidence but it did make several findings of fact which support our contention that the desire to see the floor show was not an incidental matter but was a cogent reason for going to Ciro's. These findings include the following:

The patrons attending the dinner in the Pavillion Room expected to be able to see the entertainment in the Main Room, it being the understanding, whether committed to writing or not, that the so-called private parties would be afforded this privilege. [Finding IX, R. 115-116.]

Ciro's was a famous night club which widely advertised its entertainment and in its advertising Ciro's not only offered the facilities of the Ciroette and Pavillion Rooms but indicated that as one of the several inducements for such gatherings in those rooms was the opportunity to view the floor show. [Findings XII and XIII, R. 116.]

While there was some variation in the way the 304 parties in the Pavillion Room were conducted, at approxi-

mately 10:30 p.m. the separation between that room and the Main Room was usually removed so as to enable the groups to view the floor show in the Main Room. [Finding VIII, R. 115.]

The taxpayer permitted members of private parties using the Ciroette Room to see the entertainment at 10:30 p.m. and some 5 per cent did in fact avail themselves of this opportunity. [Finding XXVI, R. 120.]

We submit that the above evidence and findings of fact established that the persons who held private parties at Ciro's were primarily interested in seeing the floor show. Of course they also liked the privacy that Ciro's room afforded them and the other facilities therein but the fact that the widely advertised floor show was being offered them was clearly a matter of major importance in each group's choice of a place to hold the parties. Obviously any of the persons attending these parties may also have had other motives for coming, such as the desire to see friends or to advance business connections but the evidence does not show what these motives were, if they existed, nor does it show which persons may have had them. However the record does contain uncontroverted evidence that the persons attending the private parties in the Pavillion Room expected to see the floor show, that most of them did stay to see it and that their representatives in arranging for the parties were assured that they could see the show. We submit that this is sufficient to satisfy the test even under the District Court's interpretation of the law.

In concluding otherwise, the District Court seems to have been largely influenced by the difference in the physical properties of the Main Room and the Pavillion Room and in the way they were operated. Thus it pointed

out that they had different furnishings, menus, prices and services. [R. 118.] However we fail to see how such differences can be material either under our interpretation or that of the District Court. And it should be noted in this connection that although the differences in these rooms were held to be important factors when considering the preperformance payments by patrons of the Pavillion Room, the District Court held that when the partition between that room and the Main Room was removed at show time "no distinction between the two rooms is warranted" and that "the Pavillion Room guests did observe and participate in the public performance in common with other patrons in the Main Room." [R. 119.]

As we have indicated, the physical differences in these two rooms can not be decisive of the issue here. Instead the essential thing under our interpretation of the statute is that patrons at private parties in the Pavillion Room and the Ciroette Room were actually entitled to be present and the evidence shows that a large number of them did stay to see the show. And under the District Court's interpretation, the record shows that that test has been met since a cogent reason for selecting Ciro's was its floor show. Certainly it can not be said that Ciro's floor show was merely an incidental reason as the District Court seems to have concluded. The word incidental, as defined in Webster's International Dictionary (Abridged 2nd ed.), means "happening as a chance or undesigned feature of something else, casual hence not of prime concern." We submit that the floor show was not "an undesigned feature" of the private parties at Ciro's but it was of prime concern and a major reason why Ciro's was chosen. In holding otherwise, the District Court has reached a decision contrary to the evidence and its own findings.

III.

The District Court Erred in Failing to Enter Judgment for the Full Amount of Taxes Assessed Inasmuch as the Taxpayer Failed to Overcome the Presumption of Correctness Attaching to the Assessment by Producing Proper Records or by Any Other Proof.

The Government assessed a cabaret tax on 94 per cent of the receipts attributed to the 304 private parties in the Pavillion Room involved herein [R. 114-115] and also assessed the same tax on 5 per cent of the receipts from the Ciroette Room during the period involved here. [R. 120.] We contend that under the District Court's interpretation of the statute as well as under that of the Government, judgment should have been given for the full amount of taxes assessed. It has long been established that a presumption of correctness attaches to a tax assessment and that the taxpayer against whom the assessment is made has the burden of overcoming such presumption. *United States v. Rindskopf,* 105 U. S. 418; *San Joaquin Brick Co. v. Commissioner,* 130 F. 2d 220 (C. A. 9th); *Crook v. United States,* 30 F. 2d 917 (C. A. 5th); also see *Maroosis v. Smyth,* 187 F. 2d 228 (C. A. 9th).

The taxpayer produced no evidence to show that the assessment here was in any way incorrect. Furthermore the taxpayer kept no records showing what proportion of the persons who attended the parties in the Pavillion Room stayed for the floor show or dancing.[6] [R. 114, 224.] But the taxpayer should have kept such records. Section 1720 of the Internal Revenue Code of 1939 (Appendix A, *infra*) provides that a taxpayer shall keep the records

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[6]As to the receipts from the Ciroette Room there are also no records but it has been stipulated that if any tax is due, it can be computed on the five per cent basis used by the Government. [R. 120.]

which the Commissioner, with the approval of the Secretary, may from time to time prescribe, and what the Commissioner has prescribed is set forth in Section 101.32 of Treasury Regulations 43 (Appendix A, *infra*) which requires the taxpayer to keep adequate records (1) as to the operations for each day on which public performances are held, (2) as to the receipts from patrons entitled to be present during any part of the performance and (3) as to the taxes due. This regulation also provides that these records shall contain sufficient information to enable the Commissioner to determine whether the correct amount of taxes has been paid, that they shall be available at all times for inspection by Internal Revenue Agents and that they shall be maintained for a period of at least four years from the date that the tax becomes due. As the taxpayer has not met these requirements and has failed to produce any evidence to show that the assessment was in any way incorrect, judgment should have been entered against him for the full amount of tax assessed.

IV.

The District Court Erred in Holding With Respect to the "Closed House" Parties That the Payments Received From the Patrons of Such Parties Did Not Entitle Them to Be Present During a Public Performance for Profit and in Failing to Hold That Such Payments Were Subject to the Cabaret Tax.

Part of the deficiency assessment involved here consists of a tax on all amounts paid for admission, refreshments, service or merchandise on twenty evenings when all facilities of Ciro's were reserved by and for the members of a particular organization. As the District Court pointed out [R. 60-61] the Government's position as to the taxability

of such receipts is set forth in the Special Ruling of August 31, 1949, 1950 C. C. H., par. 6053, which reads in part as follows:

> Where a private organization arranges to hold an affair in a room at a hotel which normally is operated as a cabaret and the affair is held under such circumstances that the hotel furnishes practically the same services including entertainment, during the same hours that the room is operated as a cabaret, the arrangements made by the private organization are regarded as a mere reservation of tables. In such case, the Bureau holds that the room is operated as a cabaret on such occasions, even though the patronage is limited to the members, together with the guests of the private organization, and the private organization furnishes entertainment in addition to that furnished by the hotel. The cabaret tax then applies to the payment made by the private organization to the hotel.
>
> * * *
>
> Where a private organization holds a dinner in a room at a hotel, under such circumstances that the hotel does not furnish any entertainment but the private organization does provide dancing facilities for the persons attending by hiring an orchestra, or furnishes other entertainment, cabaret tax does not apply to any amount paid in connection with the affair.

We submit that this is a proper interpretation of the statute and that the key to taxability of receipts from "Closed House" parties is the cabaret's furnishing a public performance for profit. Thus it is the Government's position here that since these parties were given during the usual cabaret hours and on nights when Ciro's would be open and operating, they were public within the meaning of the statute and the only factor which could prevent

the imposition of a tax on payments connected therewith would be that the entertainment had been furnished by the private organizations rather than by Ciro's.

The District Court said that it would not pass on the correctness of the above ruling but it did make the test therein the basis for its decision here for after pointing out that no court had yet passed on the ruling, it said that even assuming its correctness, the Government could not prevail on this issue because the organizations which gave the parties at Ciro's contracted for their own entertainment and music. [R. 61-62.] We submit that the District Court was in error in reaching that conclusion since it is contrary to the evidence.

As the District Court found [R. 121], the show and the orchestras usually provided for the "Closed House" parties were the same as those regularly scheduled by Ciro's at the time of the parties. But we can not accept the court's finding [R. 121] that the private organizations contracted for their own entertainment and music.

Mrs. Dolores Miller who handled the preliminary arrangements for Ciro's admitted that in a letter about a party given on March 13, 1952, she offered the regular show and orchestra at Ciro's and that at such time she was acting as a go-between between the entertainers and groups who were arranging for "Closed House" parties. [R. 319-320.] Also see testimony about letter dated June 6, 1952, which also indicated that Mrs. Miller was making arrangements for the group's entertainment. [R. 322-323.] Moreover, although Mrs. Miller testified that

she did not have anything to do with arranging entertainment for such parties later on, letters dated February 17, 1953, October 26, 1953, December 1, 1953, and June 11, 1954, show that the groups involved were not only requesting Ciro's regular orchestra and show but such letters also indicate that Mrs. Miller was actually making the arrangements. [R. 324-326.]

Our position is further supported by the testimony of Mr. Warren Penn, who had made the arrangements for one of the "Closed House" parties and who stated that the entertainment his organization had was furnished by Cugat and his group, they being Ciro's regular entertainments at that time. Attention is called particularly to the following excerpt from Mr. Penn's testimony [R. 330-331]:

> Q. You never made any arrangements with Mr. Cugat with regard to this show?
>
> A. No, I didn't talk to him.
>
> Q. Or with any theatrical agents for Mr. Cugat?
>
> A. No, none whatever.
>
> Q. All your arrangements were made with the management, that is the personnel of Ciro's?
>
> A. Yes, with Johnnie Oldrate.
>
> Q. To whom did you give the check made to Mr. Cugat?
>
> A. I had the check made out and Mr. Oldrate asked me if I had a check for the money, and I said: "Yes, I am going to give it to Mr. Cugat in a minute."
>
> He said, "Give it to me and I will give it to him." So I gave him the check and I guess he gave it to them.

We also call attention to the testimony of Mr. David S. Greenberg. He arranged for a "Closed House" party at Ciro's on December 23, 1953, and stated that he made his arrangements with Mrs. Miller. [R. 336-337.] Then he testified as follows [R. 340-341]:

> Q. What arrangements were made with Ciro's with respect to the entertainment?
>
> A. Well, we just asked them for the regular show.
>
> * * * * * * * *
>
> Q. How did you arrive at the amount the entertainers were to be paid, was that told to you by Ciro's?
>
> A. That was told to us the evening of the affair, yes.

Mr. Sol Hirschhorn, who arranged for a "Closed House" party early in 1955 testified that he told Mrs. Miller he wanted Ciro's entertainment, that at the time arrangements were made for the party Mrs. Miller did not know who the entertainers would be but said she would be glad to help him, that his group was to pay the entertainers direct and that he was told either by Mrs. Miller or by the maitre d' at Ciro's how to divide the amount due to various entertainers. [R. 333-335.]

From this evidence, it is apparent that the various organizations which had "Closed House" parties used the same orchestra and floor show that Ciro's was offering to the public and that the arrangements by these groups amounted to no more than a reservation of all the tables. Thus we submit the District Court was in error in not

finding that Ciro's had in fact arranged for the entertainment at these "Closed House" parties and in not holding that the payments received therefrom were subject to the cabaret tax.

As the taxpayer has opposed the application of the above ruling to this issue we wish to explain and answer the contention advanced by him in the District Court. The taxpayer argued that this ruling is contrary to those cases which determine the applicability of the cabaret tax on the basis of whether the parties are public or private and cited *United States v. Lambeth,* 176 F. 2d 810 (C. A. 9th), and *Naylor v. United States,* 102 F. Supp. 309 (S. D. Cal.). We do not agree that either of those cases is applicable here as both involved private clubs. Obviously the clubs therein would not be furnishing their members and guests of their members public performances for profit. Therefore the parties involved in those cases were the same as if they had been held in the member's own homes. It should also be noted that in the *Lambeth* case this Court refused to overturn the lower court's finding of fact that the taxpayer had not been serving the public. And in the *Naylor* case the issue was whether the alleged club was in fact a *bona fide* club and as the court found that it was, there could then be no question as to the music and dancing therein constituting a private rather than a public performance.

Conclusion.

The judgment of the District Court was erroneous insofar as it failed to order the taxpayer to pay the entire amount of taxes and interest asserted and should be reversed to that extent.

Respectfully submitted,

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January, 1959.

APPENDIX A.

Internal Revenue Code of 1939:

SEC. 1700. TAX.

There shall be levied, assessed, collected, and paid—

* * * * * * * *

(e) [as amended by Sec. 622, Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 404(a), Revenue Act of 1951, c. 521, 65 Stat. 452, and Section 201(c), Excise Tax Reduction Act of 1954, c. 126, 68 Stat. 37] *Tax on Cabarets, Roof Gardens, Etc.*—

(1) *Rates.*—A tax equivalent to 20 per centum[7] of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a "roof garden, cabaret, or other similar place." A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is

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[7]The rate of tax was changed to 20 per cent by Section 3(a), public Debt Act of 1944, c. 240, 58 Stat. 272, which amended Section 1650 of the 1939 Code, a section specifying war tax rates.

not increased by reason of the furnishing of such performance. * * *

* * * * * * * *

(26 U. S. C. 1952 ed., Sec. 1700.)

SEC. 1720. RECORDS, STATEMENTS, AND RETURNS.

Every person liable to any tax imposed by this chapter, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribed.

(26 U. S. C. 1952 ed., Sec. 1720.)

Internal Revenue Code of 1954:

SEC. 4231. IMPOSITION OF TAX.

There is hereby imposed:

* * * * * * * *

(6) *Cabarets.*—A tax equivalent to 20 percent of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The tax imposed under this paragraph shall be returned and paid by the person receiving such payments. * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 4231.)

SEC. 4232. DEFINITIONS.

(a) *Admission.*—The term "admission" as used in this chapter includes seats and tables, reserved or otherwise, and other similar accomodations, and the charges made therefor.

(b) *Roof Garden, Cabaret or Other Similar Place.*—The term "roof garden, cabaret, or other similar place,"

as used in this chapter, shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a "roof garden, cabaret, or other similar place."

(c) *Performance for Profit.*—A performance shall be regarded as being furnished for profit for purposes of section 4231 (6) even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

(26 U. S. C. 1952 ed., Supp. II, Sec. 4232.)

Treasury Regulations 43 (1941 ed.):[8]

Sec. 101.13 [As amended by T. D. 5385, 1944 Cum. Bull. 637, and T. D. 5349, 1944 Cum. Bull. 639]. *Basis, rate, and computation of tax.*—The tax imposed by section 1700(e), as amended, applies to all amounts paid for admission, refreshment, service, and merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The tax is at the rate of 20 per cent of the total amounts so paid.

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[8]These Regulations were also made applicable to Sections 4231 and 4232 of the 1942 Code, *supra,* by T. D. 6091, 1954-2 Cum. Bull. 47.

Charges collected prior to commencement of a performance are not taxable with respect to such performance, if the patron does not remain for any part of the performance.

The liability for the tax is imposed upon the person receiving payment of the charges mentioned, and the tax must be paid by such person regardless of whether collected from the patron either as a separate charge or by being included in the amounts charged for admission, refreshment, service, and merchandise.

* * * * * * * * *

Sec. 101.14 [As amended by T. D. 5192, 1942-2 Cum. Bull. 249, and T. D. 6007, 1953-1 Cum. Bull. 412]. *Scope of tax.*—The term "roof garden, cabaret, or other similar place" includes any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise, except that after 10:00 a.m. November 1, 1951, such term does not include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would otherwise be considered as a roof garden, cabaret, or other similar place. The exception with respect to ballrooms, dance halls, or other similar places, applies only to such of those establishments which are operated primarily to furnish music and dancing privileges and where the serving or selling of food, refreshment, or merchandise constitutes in fact an incidental or subsidiary service in relation to the furnishing of music and dancing privileges.

A public performance furnished at a roof garden, cabaret or other similar place shall be regarded as being

furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurant, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

Amounts paid for refreshment, service, or merchandise in a room which is entirely separate from the room in which entertainment is furnished are not subject to tax, provided that the patrons in such separate room may not witness the entertainment and any door in the wall or partition separating the two rooms remains closed during the period of the entertainment except when persons pass from one room to the other.

* * * * * * * * *

Sec. 101.32 [As amended by T. D. 5385, *supra,* and T. D. 5673, 1948-2 Cum. Bull. 165]. *Records—Admissions.*—* * *

* * * * * * * * *

(B) *Admissions subject to tax under section 1700(e), as amended.*—Every person required to pay the tax imposed by section 1700(e), as amended, on charges made for admission, refreshment, service, and merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, must keep or cause to be kept adequate and sufficient records with respect to the operation for each day on which such public performances are held showing (1) the receipts from charges made for admission, refreshment, service, and

merchandise paid by all patrons entitled to be present during any part of the performance; and (2) the tax due.

Where the passing on of the tax is evidenced by the use of waiters' checks or bills which show the tax as a separate item or by the use of a cash register which records the tax under separate symbols on the cash register tape, as provided by method (1) or (2) included in paragraph four of section 101.13, the total receipts from patrons (exclusive of tax) and the total taxes passed on to them as disclosed by the waiters' checks or bills or the cash register tapes for each day should be entered in the daily record. Where the tax is not shown as a separate item but the passing on of the tax is evidenced by the use of signs or by statements on the menus, as provided by method (3) included in paragraph four of section 101.13, the gross receipts for each day should be entered in the daily record.

Such records shall contain sufficient information to enable the Commissioner to determine whether the correct amount of tax has been paid. The records shall at all times be open for inspection by internal revenue officers, and shall be maintained for a period of at least four years from the date the tax became due.

Where the passing on of the tax to the patrons is evidenced by entries on waiters' checks or bills or by the use of a cash register, the waiters' checks or bills or the cash register tapes must be kept by the establishment for a period of not less than six months.

(C) *Duplicate returns.*—Subject so far as applicable to the conditions prescribed as to other records required by this section each person required to keep such other records shall also retain in his records the duplicate returns required by section 101.33.

Rev. Rul. 54-487, 1954-2 Cum. Bull. 376:

Regulations 43, Section 101.13: Basis, rate, and computation of tax.

Advice is requested concerning the application of the cabaret tax imposed by section 1700(e) of the Internal Revenue Code of 1939 to amounts paid for food and refreshment served in a cabaret under the following circumstances.

In the instant case, a cabaret serves full course dinners between the hours of 5 p.m. and 9 p.m. After that time all food and refreshments are served on an a la carte basis. Entertainment in the cabaret begins at 9:30 p.m. Some of the customers call for and pay their checks before the entertainment begins, but remain to finish their meals and are able to witness all or part of the entertainment.

Section 1700(e) of the Code imposes a tax equivalent to 20 percent of all amounts paid for admission, refreshment, service, or merchandise at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" includes any room in any hotel, restaurant, hall or other public place where music and dancing privileges or any other entertainment except instrumental or mechanical music alone are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise.

The cabaret tax applies to all amounts paid for food, refreshment, service, or merchandise by patrons or guests who are present during any part of the entertainment, even though such patrons or guests make payment for the food, refreshment, service, or merchandise

prior to the time the entertainment starts. For the tax to apply, it is not necessary that such patrons or guests be able to witness the entertainment, and partake of food or refreshments at the same time.

It is held that payments for food, refreshment, service, or merchandise made prior to the beginning of the entertainment in a cabaret, roof garden or other similar place are subject to the cabaret tax imposed by section 1700(e) of the Code, where the patrons or guests by or for whom such amounts are paid remain for any portion of the entertainment afforded. However, the tax does not apply to payments made by or for patrons or guests who leave the establishment prior to the beginning of the entertainment, or who enter and leave during an intermission period, or who enter after the entertainment has ceased.

APPENDIX B.

Exhibit	Identified	Offered	Received
Plaintiff's Exhibit 1	R. 131	R. 155	R. 155
" " 2	R. 131	R. 155	R. 155
" " 3-A	R. 131	R. 155	R. 38, 170
" " 3-B	R. 131	R. 155	R. 155
" " 3-C	R. 131	R. 155	R. 155
" " 3-D	R. 131	R. 155	R. 155
" " 4-A	R. 131	R. 155	R. 156
" " 4-B	R. 131	R. 155	R. 156
" " 4-C	R. 131	R. 155	R. 156
" " 5	R. 156	R. 156	R. 157
" " 6	R. 167-168	R. 167	R. 168
" " 6-A	R. 193	R. 193	R. 193
" " 7	R. 183	R. 183	R. 183
" " 8	R. 193	—	—
" " 9	R. 346	—	—
Defendant's Exhibit A	R. 226	R. 227	R. 227
" " B	R. 247	R. 247	R. 247
" " C	R. 251	—	—
" " D	R. 262	—	—
" " E	R. 265	R. 265	R. 266
" " F	R. 276	R. 276	R. 276
" " G	R. 279	R. 278	R. 40, 280
" " H	R. 282	R. 282	R. 282
" " H-1	R. 283	R. 283	R. 284
" " I	R. 303	R. 305	R. 305
" " J-1 through J-9	R. 318	R. 326	R. 326
" " K	R. 327-328	R. 328	R. 328
" " L	R. 333	R. 333	R. 333
" " M-1 through M-3	R. 335	R. 335	R. 335
" " N-1 and N-2	R. 335	R. 336	R. 336
" " O	R. 338	R. 339	R. 339
" " P	R. 339	R. 339	R. 42